



October 1, 2001

Mr. Sam Haddad
Assistant General Counsel
Open Government Section
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2001-4391

Dear Mr. Haddad:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152621.

The Comptroller of Public Accounts (the “comptroller”) received a request for the gross annual volume of sales by establishment in the Standard Industrial Classification codes for fifty-eight eating and drinking establishments and fifty-four food stores. You state that you have released some of the responsive information. You claim, however, that some of the requested information is protected from disclosure by section 552.101 of the Government Code in conjunction with sections 111.006(a)(2) and 151.027(b) of the Tax Code. We have considered the exception you claim and reviewed the submitted sample information.¹

We note at the outset that the comptroller failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301(b) provides that a “governmental body must ask for the attorney general’s decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information].” You have explained the efforts the comptroller used in seeking a clarification from the requestor. *See Gov’t Code § 552.222* (stating that governmental body may ask requestor to clarify or narrow scope of request, if governmental body determines in good faith that it cannot identify the requested information, or that scope of information requested is unduly broad); *see also* Open Records Decision No. 663 (1999). However, after reviewing the submitted facts, we find that the comptroller has not adequately demonstrated

¹We assume that the “sample” records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

to this office that the ten-day deadline for requesting a decision was tolled because you do not inform us of the dates when you attempted to clarify by telephone. See Open Records Decision No. 663 (199) (discussing, among other things, process used to establish tolling of request). The comptroller's failure in this matter results in the presumption that the requested information is public. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). In order to overcome this presumption, the comptroller must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. The applicability of section 552.101 provides such a compelling reason.

Section 552.101 of the Government Code excepts from required public disclosure information that is confidential by law, including information made confidential by statute. Section 111.006(a)(2) of the Tax Code provides that information "secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer" is confidential. Tax Code § 111.006(a)(2). Chapter 151 of the Tax Code, which pertains to sales, excise, and use tax, also has a similar confidentiality provision. See Tax Code § 151.027(b). You state that the requested information was "obtained during the course of an examination of a taxpayer's profit, loss, and expenditure record." Based on your representations, we conclude that the requested information is confidential under sections 111.006(a)(2) and 151.027 of the Tax Code and must, therefore, be withheld under section 552.101 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

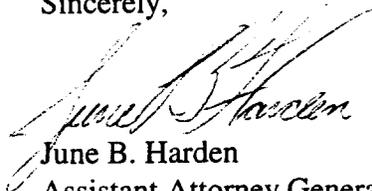
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 152621

Enc: Submitted documents

c: Mr. Mario Seminara
HHS Manager
Environmental and Consumer Health
Austin/Travis County Health & Human Services Department
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Austin, Texas 78702
(w/o enclosures)